6-23-2016

Wyman v. Eck Respondent's Brief Dckt. 43730

IN THE SUPREME COURT FOR THE STATE OF IDAHO

JOHN E. WYMAN, an individual, and MARGO WYMAN, an individual,

Plaintiffs,

vs.

JOHN J. ECK, M.D., an individual, JULIE L. SCOTT, PA-C, an individual, CENTER FOR LIFETIME HEALTH, LLC and JOHN DOES 1-10,

Defendants.

Supreme Court Docket No. 43730

District Court Case No. CV-OC-2014-16977

RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

HONORABLE JAMES MORFITT, District Judge

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a medical malpractice case. Plaintiffs/Appellants John and Margo Wyman (hereinafter the "Wymans") allege that Defendants/Respondents John Eck, M.D. Julie Scott, PA-C and Center for Lifetime Health (hereinafter "Defendants") failed to timely diagnose cancer on Mr. Wyman's left heel, after which he failed to return for follow-up care as instructed on multiple occasions in December 2011 and April 2012. The Wymans' appeal the October 6, 2015, Judgment and Order granting summary judgment and dismissing the case by the Honorable James Morfitt. Defendants contend the decision of Judge Morfitt should be affirmed as there was no disputed material issue of fact that the Wymans' cause of action accrued more than two years before any claim was filed. As a result, the Wymans' claims were completely barred per Idaho Code §5-219(4)

B. STATEMENT OF FACTS

On December 22, 2011, John Wyman was seen by Defendant Julie Scott PA-C at Defendant Lifetime Health with complaints of a sore on the bottom of his left foot. (R. pp. 17, 38-39). The patient reported the spot on his foot had been bothering him for a period of three to four months. ***Id.*** Mr. Wyman reported using an over-the-counter medication to treat the lesion, however, the area had become inflamed and appeared to be infected. (R. pp. 38-39). The patient was prescribed an antibiotic and told to return in two weeks for further evaluation to see if it improved. ***Id.*** Mr. Wyman scheduled his follow up visit for two weeks later January 5, 2012; however, he cancelled the

appointment and did not return. ***Id.***

After several months of not following up with any health care provider, Mr. Wyman returned to see Julie Scott PA-C on April 19, 2012. (R. pp. 18, 40-41). Mr. Wyman requested the lesion on his foot to be frozen off by way of cryotherapy which was accomplished that day. ***Id.*** Mr. Wyman was again instructed to return for follow up care in three weeks, however, despite being called to confirm his May 10, 2012 appointment, Mr. Wyman failed to return or reschedule his appointment. ***Id.*** Mr. Wyman never thereafter returned to see any of the Defendants.

Mr. Wyman presented for a total of two visits to see Defendants for the lesion on his left heel. (R. p. 38-41). For reasons unknown, Mr. Wyman never returned after his second visit on April 19, 2012. Instead, four months later on August 25, 2012, Mr. Wyman complained about the condition of his left heel which had continued to worsen to a family friend who was a nurse practitioner. (R. p. 18-19). It was not until August 31, 2012 that Mr. Wyman next sought medical care for the lesion on his heel. (R. p. 19).

At that time, Mr. Wyman presented to dermatologist, Jared Scott, M.D., who performed a shave biopsy of the lesion area and sent it to a pathologist. (R. pp. 19, 134-35). The pathology report came back positive for an ulcerated nodular malignant melanoma – i.e. cancer. ***Id.*** This melanoma had grown, ulcerated, and spread into lymph nodes as a result of the patient's failure to return months earlier as indicated. (R. p. 119). The shave biopsy performed by Dr. Scott was the very same procedure Defendants would have performed earlier but for Mr. Wyman's failure to return as

instructed. (R. pp. 118-19). Mr. Wyman ultimately underwent surgery to remove the cancerous growth on September 25, 2012. ***Id.*** This surgery would have been medically necessary and would have taken place much earlier had Mr. Wyman returned to see the Defendants as instructed. ***Id.***

C. COURSE OF PROCEEDINGS

The Wymans filed their Application for a Prelit Hearing on August 28, 2014, over two years and four months after Mr. Wyman's last visit with Defendants. (R. p. 43). A prelitigation hearing was held on November 20, 2014. (R. p. 17). The initial complaint naming Defendants Center for Lifetime Health, LLC and Julie Scott, PA-C was not filed until September 4, 2014, again more than two years and four months after Mr. Wyman's last visit with Defendants. (R. p. 5). An amended complaint adding Dr. Eck as a Defendant was not filed until November 18, 2014. (R. p. 15).

In their answer, Defendants pled the affirmative defense that the claims against all Defendants were barred by virtue of the two year statute of limitations set forth in Idaho Code §5-219(4). (R. pp. 28-31). In pursuit of this affirmative defense, Defendants filed a motion for summary judgment on February 3, 2015. (R. p. 32). Following a hearing, on April 2, 2015, the district court entered its initial written order denying the defense motion. (R. pp. 101-111).

The district court concluded the allegations set forth in the Wymans' amended complaint would not be deemed judicial admissions for purposes of providing objective evidence necessary to trigger the running of the statute of limitations. (R. p. 109). Relying on the Idaho Supreme Court's decision in ***Hawley v. Green***, 117 Idaho 498, 788 P.2d 1321 (1990), the district court concluded the

defense had not provided objective medical evidence that any damage was occurring at the time Defendants allegedly failed to diagnose Mr. Wyman's cancer condition. The defense motion was denied because the record did not establish whether Mr. Wyman's heel lesion was progressive, malignant or otherwise dangerous as of his last visit with Defendants on April 19, 2012 necessary to satisfy the some damage requirement to start the statute of limitations. (R. pp. 109-110).

After conducting additional discovery, Defendants filed a renewed motion for summary judgment on July 24, 2015. (R. p. 112-14). This motion was supported by an affidavit from Gregory Wells, M.D. a board certified dermatologist and dermatopathologist from Boise. (R. pp. 115-142). The Wymans opposed the motion with the deposition testimony of Mr. Wyman's treating oncologist from Utah, Dr. Hung Khong (R. pp. 164-217).[1]

At oral argument on the defense motion, the district court concluded the foundation for the testimony by Dr. Khong, to the extent he was advancing any opinions at all, was legally deficient. (R. pp. 227-230; Tr. Vol. I. p. 38, L 11 to p. 45, L. 9). The district court further concluded that the testimony of Dr. Wells conclusively demonstrated that Mr. Wyman's cancer was objectively ascertainable more than two years before any lawsuit or prelitigation screening panel application was filed. (R. pp. 227-230; Tr. Vol. I. p. 38, L 11 to p. 45, L. 9). As a result, the district court granted the defense motion. ***Id.*** Judgment in favor of Defendants was thereafter entered by the district court on October 6, 2015. (R. pp. 231-232). This appeal followed. (R. pp. 233-237).

II. ISSUES PRESENTED ON APPEAL

A. Did the District Court err in concluding that the affidavit of Dr. Wells established that Mr. Wyman's cancer was objectively ascertainable more than two years before any claim was filed?

B. Did the District Court abuse its discretion in determining that the deposition testimony of Dr. Khong was self-limited, indefinite and therefore inadmissible for purposes of creating an issue of fact sufficient to preclude summary judgment?

III. ADDITIONAL ISSUE PRESENTED ON APPEAL

A. Are Respondents entitled to attorney fees on appeal pursuant to Idaho Code § 12-121 and I.A.R. 41(a) due to Appellants' failure to identify any misapplication of well settled law and/or abuse of discretion by the district court?

IV. STANDARD OF REVIEW

In an appeal from the grant of a motion for summary judgment, the appellate court utilizes the same standard of review used by the district court originally ruling on the motion. ***Conway v. Sonntag***, 141 Idaho 144, 106 P.3d 470 (2005); ***Arregui v. Gallegos–Main***, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012). The statute of limitations is an affirmative defense and the defendant has the burden of establishing the elements necessary to establish the defense. ***Hawley v. Green***, 117 Idaho 498, 504, 788 P.2d 1321, 1327 (1990); ***see also Stuard v. Jorgenson***, 150 Idaho 701, 704, 249 P.3d 1156, 1159 (2011); ***Conner v. Hodges***, 157 Idaho 19, 23, 333 P.3d 130, 134 (2014).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together

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[1] As outlined in the argument section below, Defendants disagree with the Wymans' interpretation of the deposition testimony of Dr. Khong.

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party." ***Dulaney v. St. Alphonsus Reg'l Med. Ctr.***, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002). "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." ***Lapham v. Stewart***, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002). If the court finds "that reasonable minds could differ on conclusions drawn from the [summary judgment] evidence presented, the motion must be denied." ***Farm Bureau Ins. Co. of Idaho v. Kinsey***, 149 Idaho 415, 418, 234 P.3d 739, 742 (2010).

However, in order for evidence to be considered on summary judgment, it must be capable of admission at trial, and "the admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." ***Gem State Ins. Co. v. Hutchison***, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007); ***Bybee v. Gorman***, 157 Idaho 169, 173, 335 P.3d 14, 18 (2014) (The admissibility of expert testimony offered in connection with a motion for summary judgment is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment.). A district court's determinations regarding

the admissibility of evidence are reviewed pursuant to an abuse of discretion standard. ***Bybee***, 157 Idaho at 335, P.3d at 14. The abuse of discretion standard requires a three-part analysis: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." ***McDaniel v. Inland Nw. Renal Care Grp.-Idaho, LLC***, 144 Idaho 219, 221–22, 159 P.3d 856, 858–59 (2007).

V. THE AFFIDAVIT OF DR. GREGORY WELLS

In support of Defendants' renewed motion for summary judgment, Gregory Wells, M.D. provided the following affidavit to address the issues and questions which the district court stated had not been answered by the defense initial motion:

> 1). The information and facts specified and recited herein are based upon your Affiant's direct and personal knowledge, and the opinions stated herein are based upon reasonable medical certainty. I am, and at all times alleged in the Amended Complaint was, a physician licensed by the Idaho State Board of Medicine to practice medicine in the State of Idaho. I have been board certified in dermatology since 2010 and dermatopathology since 2011 and have medical staff privileges in Boise and Meridian. I have been employed since 2011 at Ada West Dermatology where I work as a dermatologist and dermatopathologist. Attached as Exhibit A is a true and correct copy of my current curriculum vitae which further documents my background, training and educational experience as a dermatologist and dermatopathologist upon which I rely to support my opinions set forth herein.
>
> 2). In my capacity as a dermatologist, it is my duty to examine patients with all manner of skin issues including all forms of skin cancers, including melanomas. In my capacity as a dermatopathologist, it is my duty to view tissue slide samples taken from patients to determine whether a condition is benign or malignant in nature. In this regard, I am routinely called upon to diagnose and treat patients with all manner of skin conditions, including numerous forms of skin cancer. Where a patient is

found to have cancer, my job includes evaluating the type, structure, nature, size and staging of the cancer, as well as addressing treatment options.

3). In this case I have reviewed medical records for John E. Wyman from Center of Lifetime Health, Jared Scott, M.D. and the Idaho Skin Surgery Center, IDX Pathology, University of Colorado Dermatopathology Consultants, and the University of Utah. In reviewing these records I have taken into consideration the observations made by others of John Wyman's skin condition on his left heel starting when he first presented on December 22, 2011. At that time, the records reflect the patient had complained of having a lesion on his left heel for three to four months. See record of December 22, 2011 attached as Exhibit B. The patient's own description of a non-healing lesion on his left heel that he had treated without success is consistent with an amelanotic melanoma which is a type of melanoma skin cancer in which the cells do not make melanin.

4). The August 31, 2012 pathology report of Christine Measham, M.D. which she sent off in consultation to the University of Colorado Dermatopathology Consultants and was read by Lori Prok, M.D, attached hereto as Exhibit C, relates to a shave biopsy demonstrating the patient had an ulcerated nodular malignant melanoma in his left heel with a Brelow's depth of at least 1.9 mm. This shave biopsy was taken at the same location on the patient's left heel for which he had presented to PA Scott during his visit of December 22, 2011. Following the August 2012 biopsy, the patient underwent surgery by Robert Andtbacka, M.D. on September 25, 2012 to excise the amelanotic melanoma from his left heel. In addition to the excision, the patient also underwent a sentinel lymph node biopsy. The lymph node biopsy showed one positive lymph node for metastatic melanoma. A subsequent dermatopathology report by Keith Duffy, M.D., of the tissue harvested during the surgery is attached hereto as Exhibit D. This report reconfirms the patient had an ulcerated metastatic melanoma involving one lymph node with a Breslow depth of 4.5mm which was graded at Stage III C. All of these facts are significant for purposes of determining the age of the melanoma and how long it had been causing damage to the patient. On October 30, 2012, he underwent a complete lymphadenectomy to the left popliteal and left inguinal region with one lymph node testing positive for metastatic disease in the left popliteal area. Please see the attached pathology report of Ting Liu, M.D. for full details which is attached hereto as Exhibit E.

5). In my daily practice of dermatology and dermatopathology in Meridian I have significant experience in evaluating and treating hundreds of patients who have

presented with both melanotic and amelanotic malignant melanomas. When a melanoma becomes ulcerated this means the covering layer of skin over the tumor itself has been destroyed through the aggressive nature of the tumor. This is the cancer condition John Wyman had when he first presented to PA Scott on December 22, 2011. Unfortunately, the patient's noncompliance and failure to return as scheduled resulted in a several month delay in further diagnosing and treating his amelanotic malignant melanoma. Despite this fact, the patient's cancer was objectively ascertainable long prior to the biopsy date of August 31, 2012 as set forth below.

6). To a reasonable degree of medical certainty John Wyman's cancer was objectively ascertainable and capable of being diagnosed when it first became symptomatic for the patient. According to the patient's own subjective reporting to PA Scott during his first visit on December 22, 2011, he had a lesion on his heel that was not healing which prompted him to seek medical treatment. Exhibit B. Had the patient presented to me at that time, I would have pursued a similar initial course of medical treatment to that provided by PA Scott. Had the patient returned as instructed in two weeks, instead of on April 19, 2012, and his condition had not improved with a continued non-healing wound, I would have considered cryotherapy as performed. If it still did not heal and the patient returned for his three week follow visit following cryotherapy, I would have recommended he undergone a biopsy at that time which would have been both medically necessary and justified which would have come back positive for a malignant melanoma. This is exactly the same course of action that Dr. Jared Scott followed when the patient returned four months later in August, 2012. The fact the patient failed to return resulted in a delay during which time the patient's cancer continued to progress and grow every day. This cancer was dangerous to the patient's health and was causing further damage to the patient's body every day it was not treated despite the fact the lesion was seen by the patient, seen by the provider and objectively capable of being diagnosed and treated but for the patient's failure to return.

7). According to the dermatopathology report from the University of Utah, significant epithelial cell involvement with vertical growth was noted within the melanoma found to be 4.5 mm thick. See Exhibit D. It takes time for a melanoma to form, grow to that depth and develop into a pT4b tumor with distant lymph node involvement resulting in Stage IIIC disease according to the 7th edition of the AJCC staging guidelines for melanoma. Due to the type and amount of disease that was determined at the biopsy and subsequent side excision, this strongly supports my

opinion that the patient's cancer was present, causing damage and capable of being objectively ascertained as of December 22, 2011, well prior to the initial biopsy performed on August 31, 2012. Cancers of this type, amelanotic malignant melanomas, are often misdiagnosed at presentation due to the lack of pigment. They often undergo other treatments because they are misdiagnosed. That being said, once biopsied, they are objectively capable of being diagnosed when they first become symptomatic. This is not speculation, but medical fact. The records in this case reflect that the patient reported relevant symptoms consistent with this condition occurring months prior to his first visit of December 22, 2011. See Exhibit B.

8). I am aware that the patient filed his application for a prelitigation screening panel hearing with the Idaho State Board of Medicine on August 28, 2014. See prelit application attached to the previously filed Affidavit of Counsel in support of original motion for summary judgment as Exhibit B. I am also aware the initial Complaint in this matter was not filed until September 5, 2014. Finally, I am aware that the Amended Complaint was not filed until November 18, 2014. In each instance, the patient's cancer and the damage it was causing the patient were objectively ascertainable more than two years before any of these documents were ever filed.

9). I am aware that Dr. Hung Khong, who is an oncologist, has testified in his deposition that he is not able to state at what point prior to the biopsy results of August 31, 2012 the patient's cancer was capable of being diagnosed. Dr. Khong concedes he is not a dermatologist or a dermatopatholgoist, he does not see patients in a dermatology setting, he does not evaluate tissue samples as I do in my daily practice nor does he even get involved in caring for melanoma patients until after they have been diagnosed and undergone surgery by other medical subspecialties like mine. It is for this reason Dr. Khong properly admits he is not qualified to render such an opinion regarding the onset of cancer. I am able to render such an opinion and I do so in this case without reservation. (R. p. 115-121).

VI. ARGUMENT

The first step the Wymans took in pursuit of their medical malpractice claim was when they filed their Application for Prelitigation Hearing on August 28, 2014. (R. p. 43). Pursuant to Idaho Code §5-219(4), this means that if the Wymans' claims accrued at any date prior to August 28, 2012,

their claims were barred. The Wymans attempt to frame the issue as whether Mr. Wyman's malignant tumor could have been diagnosed at the time he sought care from Defendants on December 22, 2011 and April 19, 2012. This is not the issue. What matters for purposes of Idaho Code §5-219(4) is whether Mr. Wyman's cancer caused some injury which could have been objectively ascertained prior to when the claim was first filed on August 28, 2012.

The district court properly credited Dr. Wells' testimony as establishing that Mr. Wyman's tumor was malignant, causing him injury, and capable of being diagnosed by medically necessary testing well prior to August 28, 2012 (and in fact could have been diagnosed on December 22, 2011). (R. pp. 227-230; Tr. Vol. I. p. 38, L 11 to p. 45, L. 9). The district court properly exercised its discretion and refused to consider Dr. Khong's purported testimony offered by Plaintiffs as to when Mr. Wyman's cancer first caused objectively ascertainable injury, because it lacked foundation. ***Id.*** The district court also properly held, in the alternative, that even if Dr. Khong's testimony was admissible, it did not conflict with Dr. Wells' testimony and therefore did not create an issue of fact. ***Id.*** For these reasons the district court properly awarded summary judgment to Defendants.

A. IDAHO CODE § 5-219(4) REQUIRED THE WYMANS TO BRING THEIR CLAIMS WITHIN TWO YEARS OF WHEN THEY FIRST SUFFERED OBJECTIVELY ASCERTAINABLE INJURY.

The Wymans' claims in this matter are governed by Idaho Code § 5-219(4). This subsection imposes a two year statute of limitations from the time the Wymans first suffer some "objectively ascertainable" damage or injury. ***Conner v. Hodges***, 157 Idaho 19, 24, 333 P.3d 130, 135 (2014).

1. Idaho Code § 5-219(4) Imposes an Absolute Two Year Cutoff from when the Wymans First Suffered Some Objectively Ascertainable Injury.

Idaho Code § 5-219(4) imposes a two year statute of limitations from the "time of the occurrence, act or omission complained of..." I.C. § 5-219(4). The Idaho Supreme Court has clarified that the statute of limitations in a malpractice action cannot begin to run until a plaintiff suffers "some damage" that is "objectively ascertainable." ***Conner***, 157 Idaho at 24, 333 P.3d at 135. In the medical malpractice context, "objectively ascertainable" means that "objective medical proof would support the existence of an actual injury." ***Id.*** The existence of "continuing consequences" or a subsequent injury do not extend the limitations period. I.C. § 5–219(4).

The test is objective, so it does not matter whether the plaintiff was aware of the injury. ***Stuard v. Jorgenson***, 150 Idaho 701, 706, 249 P.3d 1156, 1161 (2011) ("To allow for accrual to begin only once the parties have been put on notice of the damage, or in other words, once the damage is actually 'ascertained' would effectively create a discovery rule, which the legislature has rejected."); ***Lapham v. Stewart***, 137 Idaho 582, 586-87, 51 P.3d 396, 400-01 (2002); ***Conner***, 157 Idaho at 24, 333 P.3d at 135. Nor does it matter whether the procedure that could have revealed the existence of the injury was ever actually performed. ***Id.*** All that is necessary to trigger the statute is the point at which a medically necessary procedure[2] would have revealed the presence of the

[2] In ***Conner v. Hodges***, 157 Idaho 19, 333 P.3d 130 (2014), the Idaho Supreme Court recently clarified that even if some type of medical procedure could have revealed a plaintiff's injury, the alleged injury is not capable of being objectively ascertained "if no physician would perform such

plaintiff's injury. ***Id.*** Under the facts presented, the defense contends the district court properly ruled the Wymans' cause of action for the alleged failure to diagnose Mr. Wyman's cancer accrued more than two years before any claim was filed.

2. The Wymans' Claims are not Subject to the Discovery Rule, and the Statute's Legislatively Imposed Deadline May Not Be Otherwise Tolled or Extended.

The moment some portion of the Wymans' injury in this case became objectively ascertainable, the statute of limitations began to run and the statute expired two years from that point. ***Stuard***, 150 Idaho at 704-05, 249 P.3d at 1161. The Wymans' claims are not subject to the limited discovery rule exception provided for under Idaho Code § 5-219(4), nor can the statute's deadline be tolled or otherwise extended. ***Id.*** While this can lead to harsh results, it was the intent of the Idaho Legislature to impose such an absolute deadline as stated in the plain language of the statute.

i. The language of Idaho Code §5-219(4) is clear.

"Failure to diagnose" claims, such as those brought by the Wymans, are not subject to the discovery rule. ***Hawley v. Green***, 117 Idaho 498, 503, 788 P.2d 1321, 1326 (1990). Idaho Code §5-219(4) only permits application of a discovery rule—which asks when a plaintiff knew or reasonably should have known of the existence of their injury—in two specific circumstances. The first is for cases involving "damages arising out of the placement . . . of any foreign object in the body" of any person. ***Id.*** The second is where the injury at issue was "fraudulently and knowingly

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procedures" under the circumstances. ***Id.*** at 25, 136. As discussed in greater detail below, the unique factual circumstances in ***Conner*** are not present here.

concealed from the injured party." ***Id.*** By contrast, "in all other actions" a plaintiff's claim accrues as soon as the plaintiff suffers some objectively ascertainable injury and "shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer." ***Id.***

The Idaho Legislature could have added additional discovery rule exceptions, but declined to do so. ***Ada Cty. Assessor v. Roman Catholic Diocese of Boise***, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993) (noting "the primary canon of statutory construction that where the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction."). As a result, the Idaho Supreme Court has consistently refused to apply the discovery rule beyond the two legislatively mandated exceptions discussed above. ***Hawley***, 117 Idaho at 503, 788 P.2d at 1326 ("However, that would reinstate a discovery rule on a statute whose enactment was predicated in part upon rejection of such a discovery rule. This we have consistently rejected."); ***Stuard***, 150 Idaho at 705, 249 P.3d at 1160; ***Davis v. Moran***, 112 Idaho 703, 708, 735 P.2d 1014, 1019 (1987); ***Streib v. Veigel***, 109 Idaho 174, 178, 706 P.2d 63, 67 (1985); ***Theriault v. A.H. Robins Co., Inc.***, 108 Idaho 303, 309, 698 P.2d 365, 370 (1985).

ii. The history surrounding the enactment of the current version of Idaho Code §5-219(4) supports the Defendants' interpretation.

In 1971, the Idaho Legislature amended Idaho Code §5-219(4) in response to several judicial decisions that applied a discovery rule to certain types of malpractice claims. In ***Billings v. Sisters of Mercy of Idaho***, 86 Idaho 485, 389 P.2d 224 (1964), the Idaho Supreme Court applied a discovery

rule to malpractice claims in which a foreign object is left in a patient's body. In ***Renner v. Edwards***, 93 Idaho 836, 475 P.2d 530 (1969), the Idaho Supreme Court extended the discovery rule to failure to diagnose cases such as the one at issue here. The ***Renner*** decision, however, was a bridge-too-far for the Idaho Legislature, and in 1972 Idaho Code §5-219(4) was amended.

This amendment partially codified the holding in ***Billings*** (the foreign object and fraud exceptions), but did not codify ***Renner's*** extension of the discovery rule to failure to diagnose cases:

> By amending I.C. § 5–219(4), the legislature narrowed the scope of ***Renner*** and, in large part, defined when a cause of action accrues for the purposes of applying the statutory period of limitations in professional malpractice actions. Under amended I.C. § 5–219(4), the discovery exception first recognized by this Court in ***Billings v. Sisters of Mercy of Idaho***, 86 Idaho 485, 389 P.2d 224 (1964), is limited to cases involving foreign objects and fraudulent concealment. In all other professional malpractice actions, "the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of...." The action must be brought within two years of that time.

Holmes v. Iwasa, 104 Idaho 179, 181–82, 657 P.2d 476, 478–79 (1983) (footnotes omitted); ***Streib***, 109 Idaho at 175, 706 P.2d at 64; ***Chicoine v. Bignall***, 122 Idaho 482, 484, 835 P.2d 1293, 1295 (1992). At the time of ***Renner***, Idaho courts were operating "without the benefit of legislative guidance" which the Idaho Legislature has now provided. ***Chicoine***, 122 Idaho at 484, 835 P.2d at 1295; ***Holmes*** 104 Idaho at 182 n.5, 657 P.2d at 479 n.5 (1983) ("Legislative intent to confine the discovery exception to cases involving foreign objects and fraudulent concealment is clear."). As a result, failure to diagnose claims, such as those brought by the Wymans here, are not subject to the discovery rule or any other form of tolling.

Thus, all this Court needs to consider regarding the statute of limitations defense in this case is: (1) did Defendants put forth sufficient admissible evidence to establish Plaintiffs suffered from some objectively ascertainably injury prior to August 28, 2012; and (2) if so, did the Wymans produce sufficient admissible evidence to create a reasonable dispute of fact on this issue. The defense contends that it met its burden and that the Plaintiffs did not.

B. THE DISTRICT COURT PROPERLY CONCLUDED THAT DEFENDANTS SUBMITTED SUFFICIENT EVIDENCE TO ESTABLISH MR. WYMAN'S CANCER CAUSED OBJECTIVELY ASCERTAINABLE INJURY MORE THAN TWO YEARS BEFORE ANY CLAIM WAS FILED.

1. A Progressive Malignant Tumor Qualifies as an Injury for Purposes of Triggering Idaho Code § 5-219(4).

Progressive malignant tumors, by definition, cause injury. ***Hawley***, 117 Idaho at 504, 788 P.2d at 1327. The fact the injury tends to become progressively worse and may eventually spread to new areas of a patient's body and cause more damage over time is irrelevant under Idaho Code §5-219(4). The uncontradicted evidence before the district court established Mr. Wyman's tumor was malignant, progressive, and objectively ascertainable prior to August 28, 2012. In fact, the evidence before the district court demonstrated that the tumor had actually caused visible tissue damage in the form of an identifiable lesion as early as December of 2011. (R. at p. 116-120 ¶¶1-7).

The Idaho Supreme Court addressed the application of Idaho Code §5-219(4) to malignant tumors in ***Hawley v. Green***, 117 Idaho 498 788 P.2d 1321 (1990). ***Hawley*** involved the claims of a plaintiff who sued her physicians for failing to diagnose a tumor which she claimed should have been

found on imaging studies dating back several years. ***Id.*** at 499. The plaintiff had chest x-rays taken in September 1979 and May 1981 and a neck x-ray taken in November 1983. ***Id.*** None of these studies resulted in the discovery of any existing tumors. ***Id.*** at 499-500. However, on September 8, 1986, the patient had another chest x-ray and CT scan performed elsewhere which revealed a large tumor. In retrospect, this tumor was shown to have been visible in the imaging studies dating back to 1979. ***Id.*** The district court in ***Hawley*** dismissed the plaintiff's claims, reasoning that the presence of a tumor in the 1979 x-rays constituted an objectively ascertainable injury sufficient for plaintiff's claims to accrue.

The Idaho Supreme Court agreed that the presence of a progressive malignant tumor constituted sufficient injury to cause a plaintiff's claims to accrue. ***Hawley***, 117 Idaho at 504, 788 P.2d at 1327. However, the Court held that the defendants had failed to provide uncontradicted evidence that the patient's tumor was malignant and progressive more than two years before the claim was filed:

> ...the record in the present case does not contain any evidence to show that any damage was occurring at the time the defendants failed to diagnose Hawley's tumor. The only facts that are established and uncontroverted in this record are that the tumor was evident on the X-rays taken between 1979 and 1983. **There is no evidence in the record** one way or another **concerning whether during 1979–83 the tumor was progressive, malignant, harmful or in any manner dangerous** at this point in time.
> ....
> In this case, the **defendants** thus **had the burden of** going forward, with uncontradicted evidence, **showing that the tumor** which appeared on the 1979–83 X-rays **was progressive or otherwise dangerous to the health of the plaintiff in order to establish that the plaintiff had incurred "some damage" at that time.**

Hawley, 117 Idaho at 504, 788 P.2d at 1327 (emphasis added); ***Hawley v. Green*** (Hawley II), 124 Idaho 385, 391, 860 P.2d 1, 7 (Ct. App. 1993) (during second appeal of this case noting the possibility that "in instances where tumors are malignant, mere growth would constitute damage or injury."); ***see also Holmes***, 104 Idaho at 181, 657 P.2d at 478 (even though glaucoma is progressive, and the damage was minor at the time of the purported missed diagnosis, injury still occurred).

Here, unlike in ***Hawley***, the record clearly indicates the presence of a malignant and progressive tumor that caused objectively ascertainable damage more than two years before the Wymans filed their application for the convening of a prelitigation hearing panel. (R. at p. 115-142). As outlined below, Defendants offered uncontradicted evidence to the district court that this tumor was malignant and progressive prior to August 28, 2012. (R. at pp. 115-121). As a result, the district court properly ruled the Wyman's claims were time barred.

2. The Affidavit of Dr. Wells Establishes Mr. Wyman's Tumor was Malignant and Causing Objectively Ascertainable Injury to him More Than Two Years Before any Claim was Filed.

Defendants' Expert, Dr. Wells M.D., submitted an affidavit in support of Defendants' Renewed Motion for Summary Judgment. Dr. Wells has been board certified in dermatology since 2010 and dermatopathology since 2011. (R. at p. 116 ¶ 1). As a dermatologist, Dr. Wells examines patients with all manner of skin issues and forms of skin cancer, including melanomas just like the one at issue. (R. at p. 116 ¶ 2). As a dermatopathologist, Dr. Wells views tissue slide samples taken from patients to determine whether a condition is benign or malignant in nature. (R. at p. 116 ¶ 2).

Based on his background training and experience, the district court properly considered the opinions set forth within affidavit of Dr. Wells as having a proper foundation.

In his affidavit, Dr. Wells clearly explained that Mr. Wyman's tumor was aggressive and causing him harm long before it was identified by other providers on August 31, 2012. In his affidavit Dr. Wells states:

> To a reasonable degree of medical certainty John Wyman's cancer was objectively ascertainable and capable of being diagnosed when it first became symptomatic for the patient. According to the patient's own subjective reporting to PA Scott during his first visit on December 22, 2011, he had a lesion on his heel that was not healing which prompted him to seek medical treatment. Exhibit B. Had the patient presented to me at that time, I would have pursued a similar initial course of medical treatment to that provided by PA Scott. Had the patient returned as instructed in two weeks, instead of on April 19, 2012, and his condition had not improved with a continued non-healing wound, I would have considered cryotherapy as performed. If it still did not heal and the patient returned for his three week follow visit following cryotherapy, I would have recommended he undergone a biopsy at that time which would have been both medically necessary and justified which would have come back positive for a malignant melanoma. This is exactly the same course of action that Dr. Jared Scott followed when the patient returned four months later in August, 2012. The fact the patient failed to return resulted in a delay during which time the patient's cancer continued to progress and grow every day. This cancer was dangerous to the patient's health and was causing further damage to the patient's body every day it was not treated despite the fact the lesion was seen by the patient, seen by the provider and objectively capable of being diagnosed and treated but for the patient's failure to return.

(R. p. 118 ¶ 6).

The excerpt above is reinforced and expounded upon throughout Dr. Wells' affidavit by additional supportive opinions. Dr. Wells explains how and why the size, type, and spreading of the tumor indicate it was malignant and causing injury for months before it was identified on August 31,

2012, and certainly more than two years before the Wymans filed their claim. (R. p. 119 ¶7). According to Dr. Wells, Mr. Wyman's malignant tumor was so aggressive it had caused a visible lesion on the skin dating back to December 2011 as admitted by the patient himself when he first presented for treatment. (R. pp. 38, 118 ¶ 5). Dr. Wells opined that a medically necessary biopsy would have revealed the presence of the malignant tumor even before Mr. Wyman first saw P.A. Scott on December 22, 2011. (R. p. 118 ¶ 6). Dr. Wells further explains that Mr. Wyman's cancer existed and was readily ascertainable in the course of normal treatment and would have been discovered sooner but for Mr. Wyman's failure to return as instructed on multiple occasions. (R. pp. 118-19 ¶¶ 5-7).

Unable to effectively dispute the substance of Dr. Wells' affidavit, the Wymans instead attempt to argue that his opinions do not fit within the accrual framework of Idaho Code §5-219(4), as set forth by the Idaho Supreme Court. Specifically, the Wymans rely on ***Hawley v. Green***, 117 Idaho 498, 504, 788 P.2d 1321, 1327 (1990) and ***Conner v. Hodges***, to argue that either: (1) Defendants failed to establish Mr. Wyman's tumor caused injury prior to August 28, 2012; or (2) the tumor was not objectively ascertainable prior to August 28, 2012. *See* Appellants' Br. at pp. 12-16. A review of both cases, however, reveals that neither of them support the Wymans' positions on appeal.

i. *Hawley v. Green* does not support the Wymans' positions.

As outlined above, ***Hawley v. Green***, 117 Idaho 498, 788 P.2d 1321 (1990) supports the

decision of the district court as the Idaho Supreme Court recognized that in a failure to diagnose case a malignant tumor is causing injury. ***Id.*** 117 Idaho at 504, 788 P.2d at 1327. Unlike in ***Hawley*** where there was an open question regarding when the tumor became malignant and therefore started causing damage to the patient, the record before the district court conclusively demonstrated that the patient had a malignancy well before the first time he was seen by the Defendants and well greater than two years before any claim was filed. (R. pp. 115-121).

According to Dr. Wells, the fact the tumor was malignant and progressive is established by its size and depth, the type of malignancy, the fact it was ulcerated, and the fact it was shown to have spread to distant lymph nodes. (R. p. 119 ¶7). In his affidavit, Dr. Wells explains how the tumor had become ulcerated and destroyed the layer of skin directly above it as of December 2011. (R. p. 118 ¶6). Every day the patient elected not to follow up as instructed the malignant melanoma on his heel was growing and causing him further damage. (R. pp. 118-19 ¶¶5-7). For these reasons, the ***Hawley*** decision does not support the Wymans' position, but rather it strongly supports affirming the decision of the district court.

The present case more closely resembles the result in ***Holmes v. Iwasa,*** 104 Idaho 179, 657 P.2d 476 (1983). In ***Holmes***, plaintiff sued his optometrist for an alleged failure to diagnose. The defendant examined the plaintiff's eyes on two different dates, but allegedly failed to diagnose him with glaucoma. ***Id.*** at 181, 478. A second doctor examined the plaintiff more than two years later, diagnosed the glaucoma and stated the condition had existed for at least eight years. ***Id.*** The district

court granted summary judgment to the defendant based on the expiration of the two year statute of limitations. ***Id.***

On appeal, the allegedly negligent act at issue was the defendant's failure to discover the plaintiff's glaucoma. It was undisputed that the defendant examined the plaintiff's eyes on only two occasions, both dates falling outside of the two year limitation period set forth in Idaho Code §5-219(4). ***Id.*** at 182, 479. Although the defendant fit the patient for glasses during visits after these two dates, there was no proof in the record that the defendant violated the standard of care by failing to examine the patient's eyes on those subsequent dates. ***Id.*** at 183. Thus, the court determined the defendant was not responsible "for any occurrence, act or omission, i.e., the failure to diagnose glaucoma, on a date within the two year limitation period set out in I.C. § 5-219(4)" and affirmed the dismissal of the case. ***Id.***

Holmes represents a nearly identical "failure to diagnose" case when compared to the claims of the Wymans. Similar to ***Holmes***, there is no showing in the record that Defendants are responsible for any occurrence, act, or omission, i.e. the failure to diagnose a malignant melanoma, on a date within the two year limitation period set forth in Idaho Code § 5-219(4). It is undisputed that the Defendants never saw the patient within the two year limitation period. (Appellants' Opening Brief at p. 6).

The affidavit of Dr. Wells establishes that Mr. Wyman's malignant melanoma existed before the December 2011 visit, and that it continued to progress and worsen after the time of both visits

when it was not identified and removed. (R. pp. 115-121). Thus, the damage to the Wymans occurred contemporaneously with the allegedly negligent act. This resulted in the accrual of the Wymans' cause of action which occurred more than two years before any claim was filed. Under I.C. § 5-219(4), it is the fact of damage, rather than the amount, that is the critical factor which triggers the running of the statute. ***Holmes,*** 104 Idaho at 181, 657 P.2d at 478.

ii. *Conner v. Hodges* does not support the Wymans' positions.

Conner v. Hodges is similarly unhelpful to the Wymans' arguments. ***Conner*** involved the claims of a patient against her obstetrician/gynecologist associated with a failed tubal ligation intended to prevent further pregnancies. ***Conner***, 157 Idaho at 21-22, 333 P.3d at 132-33. More than two years after the procedure, the patient learned that she had become pregnant and filed her claim. ***Id.*** The defendant argued the statute of limitations had expired because two procedures, a hysterosalpingogram or a laparoscopic chromotubation, could have been performed and would have revealed the tubal ligation had not been successful. ***Id.*** at 22, 133. However, the plaintiff argued, with expert support, that neither of those tests were "medically necessary nor would there have been any medical justification for performing either procedure." ***Id.*** at 25, 136. In fact, plaintiff's expert opined that "any physician who recommended or performed such a risky, painful, expensive, and medically unnecessary procedure would be subject to disciplinary action and could possibly have his or her medical license revoked." ***Id.***

On appeal, the Idaho Supreme Court agreed with the plaintiff and held that even if a medical

procedure could possibly reveal a plaintiff's injury, that the injury would not be deemed objectively ascertainable under the statute of limitations if the medical procedure was one that no doctor would perform. ***Id.*** The court in ***Conner*** explained that "objectively ascertainable" for purposes of triggering the statute of limitations means "that the existence of the injury is *capable* of being objectively ascertained." ***Conner***, 157 Idaho at 24, 333 P.3d at 135 (quoting ***Stuard v. Jorgenson***, 150 Idaho 701, 706, 249 P.3d 1156, 1161 (2011). Since the plaintiff's expert established that neither of the tests proposed by the defendant would have been medically necessary or justified, this meant the alleged injury was not capable of being objectively ascertained more than two years before the claim was filed. ***Id.*** at 25.

What transpired in ***Conner*** is not analogous to what happened with Mr. Wyman. When Mr. Wyman failed to return to see the Defendants as instructed, his cancer was identified by a different provider by way of a biopsy performed on **August 31, 2012**. The Wymans filed their Application of Prelitigation Hearing on **August 28, 2014.** (R. p. 43). Thus for the dictates of ***Conner*** to apply, the Wymans were required to prove to the district court that at all times before **August 28, 2012** a biopsy (or another established method of diagnosis) was so dangerous or uncalled for "that no physician would perform such procedure." ***Conner***, 157 Idaho at 25, 333 P.3d at 136. No such evidence was provided to the district court.

Unlike in ***Conner***, the Wymans provided no expert testimony that the biopsy would not have been medically indicated or necessary prior to August 28, 2012. By contrast, Defendants' expert Dr.

Wells opined the biopsy not only could have, but would have, been performed in the normal course of treatment long before August 28, 2012 (and could have been performed as early as December of 2011 when Mr. Wyman first presented). (R. pp. 118-19 ¶¶5-7). The only reason it was not, was due to the fact that Mr. Wyman failed to return for his follow-up appointments as instructed. ***Id.***

Second, unlike the patient in ***Conner*** who did not know the underlying surgery had been unsuccessful until more than two years later when she became pregnant, here the record reflects that Mr. Wyman knew he had an ongoing problem that needed further medical care. (R. p. 38-41). Mr. Wyman admits in his Amended Complaint that he had ongoing problems with the lesion on his left heel after his last visit with the Defendants which he subsequently complained to other providers about. (R. p. 18-19). Mr. Wyman was specifically instructed (as documented in the health care records) that he needed to return for follow-up care for the very purpose of allowing additional examinations and testing to be conducted on his left heel. (R. pp. 38-41, 115-121). The unrefuted affidavit of Dr. Wells established that if that advice been heeded by Mr. Wyman, it would have resulted in testing that would have led to the earlier diagnosis of the amelanotic malignant melanoma. (R. p. 115-121).

Finally, and perhaps in recognition of these critical distinctions above, the Wymans' mischaracterize Dr. Well's opinions in an attempt to fit them into the narrow holding in ***Connor***. Plaintiffs incorrectly state that "according to [Dr. Wells] once you have the benefit of a biopsy which shows cancer, then you can go back to any point in time where symptoms of any nature existed to

prove the onset of cancer and assert harm has been caused." Dr. Wells never opined that all cancer is objectively ascertainable at the time symptoms "of any nature" present. Instead, he opined that the clinical and laboratory data available demonstrated that Mr. Wyman's cancer was aggressive enough that it manifested symptoms in the form of visible tissue damage (the lesion) as early as December of 2011, and that it was capable of being diagnosed at that point. (R. pp. 118-119 ¶¶ 6-7).

The Wymans attempts to create a dispute about whether Mr. Wyman's cancer could have been diagnosed in December of 2011 or whether such a diagnosis required a biopsy are simply red herrings. (Appellants' Br. at p. 14-15). All that matters under Idaho Code §5-219(4) is whether the Wymans' injury was capable of being objectively ascertained more than two years before any claim was filed, i.e. before **August 28, 2012.** Dr. Wells' affidavit clearly renders that necessary opinion. Indeed, the same biopsy that was performed on August 31, 2012, after Mr. Wyman's new provider learned the prior cryotherapy treatment provided by the Defendants had been unsuccessful, would have been performed earlier if the patient had only returned. (R. pp 118-120 ¶¶ 5-7).

Mindful of existing case authority, the affidavit of Dr. Wells was drafted to include the precise information which the defense was lacking in ***Conner***. (R. pp. 117-120 ¶¶ 4-7). The Wells affidavit provided the district court with unrefuted testimony that the patient's cancer was capable of being objectively ascertained by way of a medically necessary and justified biopsy of the lesion of his left heel more than two years before any claim was filed. (R. pp. 118-120 ¶¶ 5-7). According to the affidavit of Dr. Wells, the condition and extent of the malignancy (as documented in the August

2012 pathology records and the patient's clinical examinations of December 2011 and April 2012) conclusively proves that the malignancy would have been diagnosed prior to August 28, 2012 if Mr. Wyman returned for his follow-up appointments as instructed. (R. pp. 118-20 ¶¶ 5-7). As a result, the district court properly ruled the Wymans' claims were barred.

C. THE DISTRICT COURT PROPERLY CONCLUDED THE WYMANS FAILED TO ESTABLISH A REASONABLE DISPUTE OF FACT EXISTED REGARDING WHETHER THE WYMANS' CLAIMS ACCRUED PRIOR TO AUGUST 28, 2012.

The Wymans rely solely on the deposition testimony of an oncologist, Dr. Khong M.D., to establish that there was a reasonable dispute of fact as to whether Mr. Wyman's malignant and progressive skin cancer was objectively ascertainable at any point prior to August 28, 2012 — a mere three days before it was identified by subsequent providers. The Wymans assert Dr. Khong "testified that without a biopsy there could be no diagnosis of malignant melanoma" and that "there is no way to determine when a cancer starts or causes harm." (Appellants' Brief at pp. 15-16).

Notably, Plaintiffs do not quote any of Dr. Khong's purported deposition testimony in their brief because Dr. Khong did not render any opinion on when Mr. Wyman's cancer began to injure him, or when that injury was objectively ascertainable. The relevant portions of the deposition transcript of Dr. Khong cited (but not quoted) by the Wymans state as follows:

> By Mr. Jones:
>
> Q. So my question for you, Doctor, is: are you aware of the timeframe from when this patient was first seen by my client, Dr. Eck?

A. Based on Dr. Eck's note, that's it. So the only thing I see - - whenever we see a patient, we look at the referring physician note; right? So that's how we get information. And so then we talk to the patient, that's how we get the history. So based on the note that we see, the patient states that in April or May of 2012, he noticed a lesion on his left heel. And then he went to his primary care physician at that time, I think. So April, May of 2012?

Q. So are you saying that the cancer was existing in April or May of 2012?

[Mr. Millard: Objects.]

A. **I can't say anything about it. I don't know because I wasn't there.**

(R. p. 182, L 7-25) (emphasis added).

Mr. Millard:

Q. First and most simple is, you agree, don't you, Doctor, that the only way **you** can actually diagnose malignant melanoma is through biopsy; correct?

A. Correct.

Q. Looking at it isn't going to give **you** a diagnosis, correct?

A. Correct.

(R. p. 195, L 20 to p. 196, L 2) (emphasis added).

Mr. Millard:

Q. Even if **you** looked at it when there was just a lesion before it was biopsied, **you** couldn't tell if that lesion was dangerous or deadly, could you?

A. **I don't know. I don't know**.

Q. It would be speculating to try to decide; correct?

A. Correct.

(R. p. 197, L 13-19) (emphasis added).

Mr. Jones:

Q. And every day that this cancer is not treated in some fashion, it's causing more damage to the patient, isn't it?

[Mr. Millard: Objects]

A. Treated by any means?

Q. Yes.

A. So of course, when we see a cancer of a melanoma, we want for treatment to be done as soon as possible, yes.

Q. So every day that Mr. Wyman does nothing to treat this cancer, it's hurting him worse; correct?

[Mr. Millard: Objects]

A. Explain again. I'm sorry.

Q. This cancer the patient had, every day he's not treated he's getting worse, isn't he?

[Mr. Millard: Objects]

A. **I don't know**. So it depends on what you mean by treatment. So cancer (sic) are very different from one person to the next person. So some patient, a cancer may take a few years to grow. Some patient may take a few months to grow. So for Mr. Wyman –

Q. Mr. Wyman was stage IIIC - -

[Ms. Goucher: Objects]

Q. For somebody that has cancer Stage IIIC, which this patient had, every day he's not treated, he's getting worse, isn't he?

[Mr. Millard: Objects]

A. **I can't answer that question because I don't know.** It doesn't mean that you don't treat every day it get worse, because nobody can answer the question for you.

(R. p. 203, L 16 to p. 205, L 8) (emphasis added).

Mr. Millard:

Q. And you can't make any comment as to whether cancer existed and whether it caused harm for John Wyman as of his visit with his treating physician in April 2012; correct?

A. **I cannot say anything about that.**

(R. p. 198, L 13-17) (emphasis added).

Mr. Jones:

Q. Okay. How long does it take for cancer to form?

[Mr. Millard: Objects.]

A. **I don't know**. Cancer, you know, can - - if you start from one tiny lesion, it can take a long time. How long, nobody knows. People are different. I can never give an answer to that. People ask me that question all the time.

(R. 183, L 9-17) (emphasis added).

The Wymans maintain these deposition statements by Dr. Khong establish that without a biopsy there could be no diagnosis of cancer. Since a biopsy of Mr. Wyman's left heel was not performed until August 31, 2012, the Wymans contend that any claim filed within two years of that

date should have been deemed timely by the district court. (Appellants' Opening brief at p. 15).[3] On this basis, the Wymans contend the district court erred in granting the defense motion.

As the above excerpts reflect, Dr. Khong did not make any such statements in his deposition in addition to which the timing of when the actual biopsy was conducted is not the determining factor. Dr. Khong made it clear that as an oncologist whose job it was to treat cancer after someone else had diagnosed it and operated on it, he did not know the answer to the questions he was posed beyond stating that he, himself as an oncologist and not a pathologist, would need a biopsy that had been evaluated by a pathologist in order render a cancer diagnosis.[4] (R. p. 197, L 13-19).

In granting the defense renewed motion for summary judgment, the district court made two alternative findings regarding Dr. Khong's deposition testimony: (1) Dr. Khong's testimony regarding when Mr. Wyman's cancer began to cause him damage and when that injury was objectively ascertainable lacked foundation and was therefore inadmissible; and (2) even if his testimony was not excluded, it failed to raise a triable issue of fact. The defense maintains that the

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[3] Defendants' reject the characterization of ***Conner*** as set forth in this section of Appellants' Opening Brief. It is irrelevant in determining the application of Idaho Code §5-219(4) that a biopsy was not actually performed in this case before August 31, 2012. The fact a biopsy was or was not performed is not the deciding factor. Rather, the issue is whether it would have been medically necessary to perform a biopsy before August 31, 2012 which Dr. Wells' affidavit confirms that it was. ***Conner***, 157 Idaho at 25; 333 P.3d at 136.

[4] Surprisingly, the Plaintiffs' elected not to obtain any affidavit from Dr. Khong or another expert in order to respond to and/or rebut the issues raised by Dr. Wells' affidavit. This could have been addressed by way of their reply to the defense renewed summary judgment motion and/or as part of a motion for reconsideration of the court's decision in favor of the defense. Neither option was explored.

district court was correct in both conclusions and that pursuant to either rationale, the decision of the district court should be affirmed in all respects.

1. The District Court Properly Exercised its Discretion by Refusing to Consider Dr. Khong's Deposition Testimony Regarding When the Wymans Suffered Some Objectively Ascertainable Injury.

Evidence offered at summary judgment must be capable of admission at trial, and "the admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." ***Gem State Ins. Co.***, 145 Idaho at 13, 175 P.3d at 175. A district court's decision to exclude expert testimony—including testimony at the summary judgment stage—is reviewed for an abuse of discretion. ***State v. Rubbermaid Inc.***, 129 Idaho 353, 357, 924 P.2d 615, 619 (1996) (exclusion of expert affidavit at summary judgment stage is reviewed for abuse of discretion); ***see also Edmunds v. Kraner***, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006). Here, the district court did not abuse its discretion when it excluded Dr. Khong's testimony which the Wyman's contend created a dispute regarding when Mr. Wyman's tumor began to injure him and when such injury became objectively ascertainable.

Dr. Khong is a medical oncologist practicing at the University of Utah who was involved in treating Mr. Wyman – he is not a retained expert by any party. (R. p. 168-69). He treated Mr. Wyman after his surgeon, Dr. Andtbacka, operated on the patient to remove the cancerous amelanotic

malignant melanoma from Mr. Wyman's foot. (R. p. 172). Dr. Khong's role was to provide chemotherapy for Mr. Wyman. (R. p. 175). During his deposition, Dr. Khong went out of his way to limit his opinions to his specialty of oncology only. (R. p. 167-207).

For example, Dr. Khong was asked to define what an ulcerated melanoma was (which is what Mr. Wyman had) in response to which he said he was not qualified to discuss it and that we would need to ask a pathologist because he only goes by what the pathology report tells him. (R. p. 174, L 21 to p. 175, L 13). When asked if he took any measurements of Mr. Wyman's melanoma, Dr. Khong again stated that he relied on the pathologists to measure and make the determination regarding the size and depth of the lesion. (R. p. 196, L 20-25). Dr. Khong admitted he only received referrals for patients from surgeons after they already had their cancer diagnosed and operated on—which is precisely what happened in this case. (R. p. 181, L 1-5). When asked whether he had an opinion regarding how long before the August 31, 2012 biopsy, Plaintiff Mr. Wyman's melanoma had existed, he said he did not know and "there's no way I can tell you." (R. p. 185, L 20 to p. 186, L 12; p. 187, L 17-21). Time and time again during his deposition Dr. Khong deferred to a pathologist regarding the identification and diagnosis of cancer. (R. p. 174, L 21 to p. 175, L 13; p. 196, L 20-25; p. 198, L 4-17).[5]

[5] Interestingly, however, Dr. Khong did discuss the fact that there were a number of ways to check a patient for a cancer recurrence other than just by way of a biopsy including by physical examination or PET scanning. (R. p. 201, L 16-25). This is important because Dr. Wells bases his conclusions that the patient had cancer based, in part, on the physical examination descriptions by the treating

The district court properly framed the issue during oral argument on Defendants' renewed Motion for Summary Judgment: "the issue today is was there uncontroverted, objective medical evidence that would support the existence of actual injury . . ." (Tr. p. 39, L 9-12).[6] In ruling on the defense motion, the district court carefully went through each of the questions responded to by Dr. Khong and how he indicated he was unable to answer and/or deferred to a pathologist regarding the onset of the patient's cancer and related questions. (Tr. p. 39, L 13 to p. 43, L 13). The deposition testimony of Dr. Khong made it clear that as an oncologist he was not involved in working up patients like Mr. Wyman to diagnose skin lesions to see if they are cancerous melanomas. He does not diagnose suspicious lesions but instead refers patients to have a biopsy performed for suspicion of cancer.

Dr. Khong limited his testimony and conceded that he only gets involved with patients like Mr. Wyman after they have already been diagnosed with cancer by dermatologists and pathologists, after they have already undergone surgery by general surgeons to try and remove the cancer, and after they have already had the severity of their cancer staged by a pathologist or dermatopathologist. (R. p. 198, L 4-17, R. p. 120). This is precisely why, in granting the Defendants' Motion for Summary Judgment, the district court ruled:

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providers. Dr. Khong also agreed that the type of cancer Mr. Wyman had, melanoma, was a dangerous type of cancer that should be treated as soon as possible. (R. p. 203, L 6 to p. 204, L 1).

[6] While the court discussed this issue in connection with the date of the last visit of April 19, 2012, in order for the case to be time barred, the defense needed only to show the existence of an actual injury more than two years before any claim was filed.

> As I noted before, Dr. Khong, who I'm sure is a fine oncologist, seemed very uncomfortable **being asked questions outside the scope of his expertise and indicated that he could not answer many of those questions.**
> ....
> I note that in – first, I'm not weighing the evidence. **I just don't believe that Dr. Khong's affidavit (sic) establishes any expertise that he had opinions such as "nobody can determine that" and I'm giving those such opinions no weight...**

(Tr. p. 43, L to p. 44, L 24); *see also* (R. pp. 227-29) (emphasis added).

The above discussion demonstrates that the district court acted within the scope of its discretion when it elected to give no weight to Dr. Khong's testimony for purposes of ruling on the defense motion.

2. Dr. Khong's Deposition Testimony Does Not Contradict Dr. Wells Regarding When the Wymans Suffered Some Objectively Ascertainable Injury.

Even if considered by the district court, Dr. Khong's deposition testimony did not create a reasonable question regarding the fact that Mr. Wyman's cancer was causing him objectively ascertainable injury prior to August 28, 2012. At no point during his deposition did Dr. Khong ever testify that Mr. Wyman's cancer was not objectively capable of being diagnosed when the Defendants saw the patient in December 2011, April 2012 or at any point between then and a period of time within two years of when the claim was filed. In fact, when asked the question directly, Dr. Khong simply stated he did not know:

> Q. So you have no idea as an associate professor of oncology at the University of Utah how much before August 31, 2012, the patient had cancer?
>
> THE WITNESS: I don't know.

BY MR. JONES: Who would know the answer to that question?

A. I don't know.

(R. p. 187, L 17-24).

Similarly, Dr. Khong did not say that without a biopsy Mr. Wyman's cancer was not capable of being objectively diagnosed by anyone, but rather he simply said that as an oncologist he was not capable of making a cancer diagnosis without seeing the results of a biopsy, because he relies on the pathologist to make the cancer diagnosis. (R. p. 187, L 17-24). Likewise, Dr. Khong did not say no one could determine when the patient's cancer became harmful, just that as an oncologist he could not make that determination. (R. p. 189, L 13 to p. 190, L 12; R. p. 198, L 13-17). Finally, Dr. Khong did not say that no one could objectively determine whether the patient had cancer as of April 2012, but rather only that he could not. (R. p. 185, L 20 to p. 186, L 12).

As found by the district court, there was nothing in the deposition testimony of Dr. Khong which contradicted or created an issue of fact with the testimony of Dr. Wells. (Tr. p. 44, L. 1-25). Indeed, the deposition testimony of Dr. Khong can be squarely harmonized with the affidavit testimony of Dr. Wells. Both doctors explain the limited roles they play in treating patients like Mr. Wyman subject to their own areas of medical expertise. Dr. Khong's role (as an oncologist) is limited to providing radiation versus chemotherapy options and treatment with patients once cancer has been diagnosed and the severity of its infiltration determined by others, whereas Dr. Wells (as a dermatologist and dermatopathologist) is actually involved in identifying and diagnosing cancers and

how far they have spread like the one the patient at issue was suffering from. (R. p. 172, L 20 to p. 175 L. 25; R. p. 115-121).

In this regard, the Wymans had ample opportunity after the June 5, 2015, deposition of Dr. Khong was taken to find a pathologist, dermatologist and/or dermatopathologist to rebut the opinions of Dr. Wells in order to create a disputed issue of fact. However, this was never done. The Wymans never sought leave of the court to obtain the opinions of a qualified expert to rebut the testimony advanced by Dr. Wells whether by way of a Rule 56(f) motion to continue or a Rule 11(a)(2)(B) motion for reconsideration. The fact the Wymans failed to do so leads to the logical conclusion that the Wymans could not find anyone who would disagree with the conclusions of Dr. Wells.

Dr. Wells' testimony that the patient's cancer was present, causing damage and capable of being objectively ascertained by way of medically necessary testing more than two years before any action was taken to pursue this claim remains unrefuted. The Wymans have not shown, nor have they attempted to show in their Opening Brief on Appeal, that it was an abuse of discretion for the district court to give no weight to the self-limiting deposition testimony by Dr. Khong. Instead, the Wymans equate Dr. Khong's complete lack of an opinion as being consistent with him having an opinion different than that of Dr. Wells. This is not true. The absence of an opinion is not synonymous to having a contradictory opinion. Dr. Khong admitted he could not opine about when Mr. Wyman's cancer was objectively ascertainable because he did not know. (R. p. 187, L 17-24).

VI. RESPONDENT IS ENTITLED TO ATTORNEY FEES ON APPEAL PURSUANT TO IDAHO CODE § 12-121 AND I.A.R. 41(A).

Idaho Rule of Civil Procedure 54(e)(1) governs the award of attorney fees. It states:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

"Idaho Rule of Civil Procedure 54(e)(1) 'creates no substantive right to attorney fees, but merely establishes a framework for applying I.C. § 12-121.'" ***Newberry v. Martens***, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005) (citing ***Huff v. Uhl***, 103 Idaho 274, 277 n.1, 647 P.2d 730, 733 n.1 (1982)).

According to the Idaho Supreme Court:

> Attorney Fees on appeal are appropriate under that statute [Idaho Code § 12-121] if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. Where an appeal turns on the question of law, **an award of attorney fees under this section is proper if the law is well settled and the appellant has made no substantial showing that the district court misapplied the law.**

Wait v. Leavell Cattle, Inc., 136 Idaho 792, 799, 41 P.3d 220, 227 (2001) (citation omitted) (emphasis added).

Defendants contend the case authorities interpreting Idaho Code § 5-219(4) are clear and well established under Idaho law. The Wymans' arguments ignore the specific requirements of the statute

and extensive case authority interpreting it. Based on the record before the Court, Defendants contend the Wymans have unreasonably pursued this appeal as they have failed to establish a credible misapplication of the law by the district court. In light of the substantial time and expense incurred as a result of this undertaking, Defendants respectfully request that they be awarded attorney fees pursuant to Idaho Code § 12-121 and I.A.R. 41(a).

VII. CONCLUSION

The harsh reality of this case is that Wymans simply waited too long to advance their claims before they became stale and time barred by operation of Idaho Code §5-219(4). The medical records and the affidavit of Dr. Wells demonstrated that Mr. Wyman's cancer existed, was causing damage, and was capable of being objectively ascertained by way of medically necessary testing more than two years before any claim was filed. Dr. Khong's deposition testimony either lacked foundation and/or failed to raise a material dispute of fact. For these reasons, the Wymans' claims are time barred and the decision of the district court should be affirmed in all respects and the Defendants should be awarded reasonable costs and attorney fees for defending this matter on appeal.

DATED this 23rd day of June, 2016.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
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QUANE JONES McCOLL, PLLC

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June, 2016, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following, by the method indicated below, addressed as follows:

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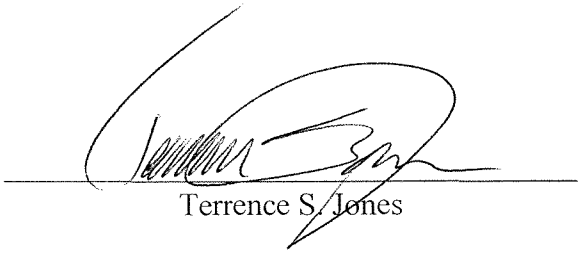

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